IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION

:

VS.

.

ROBERT DORSEY : NO. 93-495

MEMORANDUM AND ORDER

Juan R. Sánchez, J. April 11, 2005

Robert Dorsey asks this Court to modify his term of imprisonment based on 18 U.S.C. § 3582(c)(2) and the retroactive application of *United States v. Booker*, 125 S. Ct. 738 (2005). The Government responds the Sentencing Commission has not lowered any guideline ranges applicable to Dorsey and *Booker* does not apply retroactively on a petition for collateral review. This Court agrees with the Government for the reasons that follow.

DISCUSSION

A jury convicted Dorsey on January 27, 1994 of possession of a firearm by a convicted felon. The late Judge Robert S. Gawthrop, III sentenced Dorsey to 293 months. The Third Circuit affirmed the conviction on February 27, 1995 and Dorsey subsequently filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. Judge Gawthrop denied this motion and Dorsey, in response, filed a motion for relief from the court's order. Judge Gawthrop denied the motion for relief from the court's order and Dorsey appealed. The Third Circuit construed Dorsey's appeal as a request for a certificate of appealability under 28 U.S.C. § 2253(c)(1). The Third Circuit denied Dorsey's request because he failed to make a substantial showing a constitutional right was denied.

More than eleven years after his conviction, Dorsey has now filed a Motion for Sentence Modification under 18 U.S.C. § 3582(c)(2). Dorsey's motion, premised on *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *United States v. Booker*, 125 S. Ct. 738 (2005), argues his sentence was "imposed pursuant to an unconstitutional mandatory guidelines system, [and] his sentence is unconstitutional and should be vacated." Dorsey's motion has no merit.

In *Booker*, the Supreme Court held the United States Sentencing Guidelines violate the Sixth Amendment. The Court determined a mandatory system in which a sentence is increased based on factual findings by a judge violates the right to trial by jury. As a remedy, the Court severed the statutory provision making the guidelines mandatory. *Booker*, 125 S. Ct. at 757 (excising 18 U.S.C. § 3553(b)(1) and stating the guidelines are advisory). In the wake of *Booker*, "district courts, while not bound to apply the [g]uidelines, must consult those [g]uidelines and take them into account when sentencing." *Booker*, 125 S. Ct. at 767.

Contrary to Dorsey's contention, *Booker* does not support a 18 U.S.C. § 3582(c)(2) claim that the Sentencing Commission has subsequently lowered the sentencing range for Dorsey's crime. The Sentencing Commission has not lowered any sentencing range applicable to Dorsey and there have

¹18 U.S.C. § 3582(c)(2) provides:

[[]T]he court may not modify a term of imprisonment once it has been imposed except that in the case of a defendant who has been sentenced to a term of imprisonment based on a **sentencing range that has subsequently been lowered by the Sentencing Commission** pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission. (emphasis added).

been no reductions in the offense level designation of Armed Career Criminal under U.S.S.G. § 4B1.4. Consequently, Dorsey is not entitled to relief under 18 U.S.C. § 3582(c)(2).

The courts of appeals that have ruled on whether *Booker* applies retroactively have unanimously held a defendant may not raise the *Booker* holding on a petition for collateral review and may not apply *Booker* retroactively. *McReynolds v. U.S.*, 397 F.3d 479 (7th Cir. Feb. 2, 2005); *U.S. v. Price*, 400 F.3d 844 (10th Cir. Mar. 8, 2005); *Humphress v. U.S.*, 398 F.3d 855 (6th Cir. Feb. 25, 2005); *Varela v. U.S.*, 400 F.3d 864 (11th Cir. Feb. 17, 2005); *Green v. U.S.*, 397 F.3d 101 (2d Cir. Feb. 2, 2005). Despite these holdings, Dorsey seeks to apply *Booker* retroactively to his sentence and to incorporate the *Booker* holding into his 18 U.S.C. § 3582(c)(2) claim. Dorsey's arguments for sentence modification are without merit. Accordingly, we enter the following:

ORDER

And now this 11th day of April, 2005, Defendant's Motion for Sentence Modification is DENIED.

BY THE COURT:
Juan R. Sánchez, J.